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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-172

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

SOUTHERN CONFERENCE OF TEAMSTERS,
Intervenor,

vs.

GROENDYKE TRANSPORT, INC., and ANN MYERS BELL dba BELL TRANSPORT COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

GROENDYKE TRANSPORT, INC., and ANN MYERS BELL dba BELL TRANSPORT COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Groendyke Transport, Inc., et al., respondent below, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals For The Fifth Circuit entered in the above entitled case wherein the court granted enforcement of the order of the National Labor Relations Board.

CITATIONS TO OPINIONS BELOW

The Board's decision and order are reported in 204 NLRB No. 27 (1973) and is contained in the Appendix A herein commencing at page A1. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 493 F2d 17 (1974) and is reproduced in Appendix B commencing at page A39. The judgment of the court is contained in Appendix C commencing at page A43. The order denying rehearing is contained in Appendix C commencing at page A44.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 20, 1974. The employer's petition for rehearing was denied on June 19, 1974. The employer's Motion to Stay the Mandate pursuant to Rule 41(b) of the F.R.A.P. was sustained granting petitioner until August 19, 1974, to make application to this court for a writ of certiorari. The jurisdiction of this court is invoked under the provisions of Title 28 USCA Section 1254(1).

QUESTIONS PRESENTED

1. Whether the employer's terminal manager's conduct with reference to employee Maass violated section 8 (a)(1) of the Act.
2. Whether the employer's terminal manager's conduct with reference to employee Statler violated section 8(a)(1) of the Act.

3. Whether the employer's alleged act of transferring Silvertooth from his own truck to ride as co-driver with Alsip violated section 8(a)(3) and section 8(a)(1) of the Act.

4. Whether the employer discharged Alsip because of his union adherence and activity in violation of section 8(a)(3) of the Act.

5. Whether the employer's terminal manager was guilty of conduct which warranted setting aside the election.

6. Whether the employer's terminal manager's alleged section 8(a)(1) violations were so extensive in number and pervasive in character that they warranted the issuance of a bargaining order.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions involved in this proceeding are as follows:

> National Labor Relations Act, Sec. 8(a)(1, 3) as amended, Title 29 USCA Sec. 158(a)(1, 3) Appendix E, page A45.

STATEMENT OF CASE

On April 14, 1972, the union filed a petition with the Regional Director for Region 16 of the National Labor Relations Board seeking an election among certain employees of the Bell Transport Company located at Longview, Texas. A hearing was conducted on the petition on May 26, 1972. On June 14, 1972, a Decision and Direction of Election was issued directing an election to take place on July 16, 1972. Twenty-six employees voted for the union and twen-

ty-six employees voted against the union. Some ballots were challenged and both the union and the employer filed objection to the election. The union made no reference to any specific unfair labor practices. On August 10, 1972, the union filed an unfair labor practice charge alleging that the employer had discharged an employee, Storch, on May 24, 1972, and another employee, Statler, on July 25, 1972. The union's charge was later amended by dropping the allegation concerning Statler and adding an allegation that the employer altered the job status of employee Silvertooth, and an allegation of a refusal to bargain. The Regional Director declined to issue a complaint on the union's allegation of a refusal to bargain. The Regional Director later issued a complaint on Case No. 16-CA-4886 based on the charges concerning Storch.

On September 19, 1972, the Regional Director issued a Supplemental Decision in the representation case and ordered a hearing to investigate both objections and challenges.

On September 28, 1972, the union filed a second charge (Case No. 16-CA-4943) alleging the discriminatory discharge of Alsip and Maass on September 24, 1972. The Regional Director refused to issue a complaint with respect to Maass but did issue a complaint with respect to Alsip.

On October 19, 1972, the Regional Director issued an order consolidating Case No. 16-CA-4886, Case No. 16-CA-4943, and the representation Case No. 16-RC-5991.

The matter thus proceeded to trial on November 7, 8 and December 7, 1972, before the Honorable Paul E. Weil, Administrative Law Judge, in Tyler, Texas, and Longview, Texas.

Highly summarized, the Administrative Trial Judge made findings as follows:

1. The Union did not obtain a majority of the valid votes counted in a Board supervised election.

2. The ambiguous warnings alleged to have been given by the employer's manager to Alsip did not constitute unfair labor practices.

3. Employer's manager's statement to employee Maass around May 1, 1972, was too ambiguous to constitute a threat.

4. Employer's manager "*at another time before the election and after the commencement of the organizational campaign*" threatened Maass in violation of Section 8(a)(1) of the Act.

5. Employer's manager's alleged threat of discharge directed to employee Silvertooth was found to be insufficient.

6. Employer's manager threatened employee Statler in "*June or early in July 1972*", a few days before election day and on election day following the voting.

7. The charge that the employer wrongfully discharged employee Storch should be dismissed.

8. The employer violated Act in transferring Silvertooth to ride with Alsip.

9. The employer violated the Act in discharging Alsip *after* the election.

10. Since the foregoing incidents (4, 6 and 8) took place during the "*critical period*" the election should be set aside.

The Administrative Trial Judge further found that the appropriate remedy was the issuance of a *Gissel* order authorized by this court in *NLRB* v. *Gissel Packing Company*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

The Board approved the Administrative Trial Judge's findings and proposed remedy in toto.

The United States Court of Appeals for the Fifth Circuit appears to have misapprehended petitioner's contentions as being confined to credibility of witnesses. The principal thrust of petitioner's argument was directed to the *insufficiency of the evidence* to support a *Gissel* bargaining order.

If there are no court imposed standards of review relating to the sufficiency of the evidence, then a *Gissel* order promulgated under the circumstances of this case can become a device to easily circumvent the provisions of the Act dealing with Board supervised elections.

In order to present the foregoing argument it is necessary to review the evidence in considerable detail to point out the vague reference as to time and place of the illegal acts, the vague references to the alleged subject matter of the alleged threats and interrogations.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit appears to be in conflict with the following decisions of the Second Circuit, Sixth Circuit and Eighth Circuit:

Bourne v. *NLRB*, 332 F.2d 47 (2 Cir.)

G P D, Inc. v. *NLRB*. 406 F.2d 26 (6 Cir.)

Arbie Mineral Feed Co. v. *NLRB*, 438 F.2d 940 (8 Cir.)

ARGUMENT AND AUTHORITIES

Introduction

The Court of Appeals' per curiam decision announced in effect that all judges of the court hearing this cause were of one mind, and the case was so clear as to render a full discussion thereof unnecessary. 21 C.J.S., Courts, §217(a), p. 401. A per curiam opinion is ordinarily appropriate in cases involving—

> ". . . A review of questions of fact, questions that involve nothing more than the discretion of the trial court, or questions that involve the application of well settled rules of law, . . . it may be employed to dispose of cases in which numerous questions are raised and to discuss them would require a long opinion that would serve no useful purpose. . . . It may be employed to dispose of cases in which anything written on the points raised would add nothing to the law."
>
> *Newmons* v. *Lake Worth Drainage District*, 87 So.2d 49 (Fla.)

The court has made in effect a summary disposition of this petition for review.

As to such dispositions this court has held:

> "The duty of the Court of Appeals . . . cannot ordinarily be discharged summarily."
>
> *Mario Mercado E. Hijos* v. *Commins*, 322 U.S. 465, 64 S.Ct. 1118.

The Court of Appeals cited Rule 18, 5th Circuit, in support of its summary approach to this proceeding. Respondent concedes that this is a salutary rule to expedite various appeals. That the rule has its limitations is demon-

strated by this court in *Taylor* v. *McKeithen*, 407 U.S. 191, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972).

> "Where Court of Appeals summarily reversed without opinion on a point which had been considered at length by district judge . . . Supreme Court would vacate judgment and remand case to the Court of Appeals . . ."

(1)

The Employer's Terminal Manager's Conduct with Reference to Employee Maass Did Not Violate Section 8(a)(1) of the Act.

The only evidence of the Employer's alleged unfair labor practice of restraining and coercing employee Maass must be found in the following testimony of employee Maass:

"On the day of the election I had another conversation with Mr. Anderson about the union. I was talking to him as I walked in the door from a trip. I came in off of a trip and I had to fill out my log. I was told to come on in. So, as I walked in the door, well, Mr. Anderson said, 'We won't get those new trucks if the union is voted in.' I didn't say nothing. I just went over there and had them sign my log book to O.K. it for a violation of 30 minutes for me to come on in. (Tr-158) I went out and voted. (Tr-159) We was told we were going to get several new trucks down there. Mr. Curtis Craig was sitting at the desk. He was the one that signed my log book. *Three of us were there when he had this conversation about the trucks.* (Tr-159)

"I have had several talks with Mr. Anderson. *Now talking about the time and pinpointing it down, well, that I can't do.* (Tr-163) *I do not remember this particular conversation in relation to any specific event that has*

taken place at Groendyke. It was after the union organizational effort started. (Tr-164) It was sometime between April and July. (Tr-165). I don't remember who else was there on that occasion. He made the statement, he said, 'Haven't you had trouble on a job before because of the union, related to the union?' I said, 'Yes, sir, I have.' Then he said, 'Did you get run off?' I said, 'No, I left.' So, he said, 'Well, you could do the same here.' Nothing else was said during this conversation." (Tr-166)

CROSS EXAMINATION OF WITNESS MAASS

"*I was discharged from the company for an accident.* (Tr-166) Prior to the time that I was discharged there had been one new truck delivered to Longview. (Tr-167) That was a new Mack. I don't remember the specific date it was delivered."

In a rebuttal to the foregoing testimony, the employer's terminal manager Anderson testified as follows:

"There could have been a conversation in my office with Mr. John C. Maass because he is in and out like the rest of them. Whenever he desired to come in, well, he would come in and sit down and visit. They would just come in and sit down. I didn't tell him he could get in trouble with the union. (Tr-412) I didn't want to talk to these guys about the union, sir, even if they wanted to bring it up. I had one man stop me out in the hall that wanted to talk to me about it. I told him, 'Don't talk to me about it.' I did not bring up the union with these people. I did not initiate any conversations about the union with them. I didn't harass anybody. I don't remember the conversation with Maass about the trucks. (Tr-413) These trucks were ordered for the Long-

view terminal and I never received any correspondence saying we would not get them. As a matter of fact, we did get them when they came in. We received six new trucks. I have had them about a couple of months, maybe 3 months. I did not tell Mr. Maass that he would not get new trucks if the union came in. (Tr-413) I do not recall a conversation with Mr. Maass concerning the fact that he had been run off of the job because of the union and that he could be run off of this job because of the union. I don't know if he was ever involved in any union dispute before he came there or not." (Tr-414)

On the basis of the foregoing testimony, the Administrative Law Judge credited in toto the testimony of Maass, an employee discharged for cause, and discredited the testimony of the employer's terminal manager. "Sworn denials of knowledge cannot be arbitrarily disregarded because of suspicion or assumption without more." *Southwest Latex Corporation* v. *NLRB*, 426 F.2d 50 (5 Cir. 1970).

The test of legal sufficiency of evidence bearing on a charge of unlawful interrogation in violation of Section 8(a)(1) has been stated as follows:

"(1) The background, i.e. is there a history of employer hostility and discrimination?

"(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

"(3) The identity of the question, i.e. how high was he in the company hierarchy?

"(4) Place and method of interrogation, e.g. was employee called from work to the boss's office?

> Was there an atmosphere of 'unnatural' formality?
>
> "(5) Truthfulness of the reply."

Bourne v. *NLRB*, 332 F.2d 47 (2 Cir. 1964)
NLRB v. *Camco, Inc.*, 340 F.2d 803 (5 Cir. 1965)

Accordingly, interrogation per se is not an unfair labor practice unless it meets certain clearly defined and severe standards. *NLRB* v. *Firedoor Corp.*, 291 F.2d 328 (2 Cir.), cert. denied 368 U.S. 921, 82 S.Ct. 242, 7 L.Ed.2d 136 (1961); *NLRB* v. *Syracuse Color Press, Inc.*, 209 F.2d 596 (2 Cir.), cert. denied 347 U.S. 966, 74 S.Ct. 777, 98 L.Ed. 1108 (1954); *NLRB* v. *Montgomery Ward & Co.*, 192 F.2d 160 (2 Cir. 1951).

Applying the foregoing tests to the testimony it can be observed that at most Maass' vague references to various spontaneous conversations with the employer's manager had reference to the manager's personal predictions and the probable consequences of unionization. It is well settled that:

> "The prediction of unfavorable consequences resulting from unionization is not a violation of the Act provided that it is a prediction of such consequences rather than a threat on the part of the employer to visit such consequences upon the employees in the event of unionization." (Citations)

G P D, Inc. v. *NLRB*, 406 F.2d 26 (6 Cir. 1969), 70 LRRM 2329

Similarly, the employer's manager's alleged statements at most were couched in terms of probable consequences of unionization rather than threats directed at Maass or other employees.

Even assuming 100% credibility on the part of Maass, we have the employer's manager charged with making these statements:

> "He asked me if I had been to the union meeting. (Tr-155) - - - I told him I had been to the union meeting. He asked me who all was there. - - - He just stated I *could* get into trouble over it - - -. He told me if I would keep hanging around Alsip I would get into trouble - - -. We won't get those new trucks if the union is voted in. - - - Did you get run off? - - - Well, you *could* do the same here - - -."

An employer's supervisor may campaign vigorously against the union and speak to employees individually or in groups. *Dempster Bros.*, 154 NLRB 688, 60 LRRM 1006 (1965). Section 8(c) of the Act clearly provides for the employer's expression of views, argument and opinion.

In a similar case the employer's manager told an employee that he "was possibly going to be in trouble because of the letter." It was held that no threat had been made since the conversation was short and isolated. *Southwest Latex Corp.* v. *NLRB*, supra.

It should be recalled in this case that both parties had approximately three months in which to campaign for this election. The finding that the isolated statements of the employer's manager threatened Maass and affected the outcome of the election is not supported by the record.

> "To justify enforcement of an order of the Board the evidence *must do more than merely create a suspicion of the existence of facts* upon which the order is based. . . ."
>
> *Southwest Latex Corp.* v. *NLRB*, supra.

(2)

The Employer's Terminal Manager's Conduct with Reference to Employee Statler Did Not Violate Section 8(a)(1).

The only evidence to support the foregoing unfair labor practice charge lodged on behalf of Statler must be found in the following testimony:

> "I had occasion to talk with Gail Anderson, the terminal manager, in regard to the union the last few days of June. *It could have possibly been right at the first of July.* I went into his office to see if I could be dispatched out a draw in advance. (Tr-362) I wanted to draw a cash advance on my check. While he was writing out the advance he told me that if the union came in there wasn't going to be anymore of these cash advances. He reminded me that I was a poor boy; that he gave me a job and took me in and treated me like a son. Then he said that he hoped that I would remember that when the vote came up. He said there was going to be quite a few people run off because of this union. (Tr-363)
>
> "I next talked to Mr. Anderson a few days before the election. Somewhere around 3 or 4 days before the election. This conversation took place in Mr. Anderson's outer office. I don't believe anyone else was present during this conversation. (Tr-364) He asked me if I had seen election notices in the driver's room. I told him 'yes.' He asked me who I was voting for. I told him that I did not know. That was the end of the conversation. (Tr-364) A couple of days after this conversation, I walked up to him out at the shop. There was no one else in on the conversation. He appeared to be pretty upset with Mr. Alsip.

H didn't say what about. He said he had Mr. Alsip and Mr. Silvertooth run together. He said that they could run up and down the road together and talk about the union. Then he said that they would be together when they left there. He said he already had run Mr. Storch off and J. C. Maass would be next." (Tr-365)

CROSS EXAMINATION

"I was first hired by Bell Transport. I had never been a truck driver before I was hired by Bell Transport. (Tr-369) I gave a statement before a Notary Public in Nat Wells' office. That is the union's attorney. R. B. Silvertooth and I went up there. (Tr-369) I was suspended by Groendyke on the 20th day of July and terminated on the 25th day of July of this year. (Tr-370) I was suspended by Groendyke because I had one accident that day and 2 others before that. (Tr-371) After I was suspended on the 20th of July, I told Roy Alsip. I was not told by Mr. Silvertooth or by Mr. Alsip or anybody else to get me to go to Dallas to tell these statements. (Tr-375) Mr. Silvertooth told me it might be possible that I could get my job back." (Tr-78)

The employer's manager categorically denied the statement that he had run off Storch and Maass. (Tr-432) At most, such statements constituted predictions or personal opinions rather than threats directed at Statler.

The employer's supervisor clearly has the right of free speech under Section 8(c) of the Act.

"We do not see, for example, how it could be held consistently with Section 8(c) that an employer may not tell employees that if a union presses its demands

> for greater benefits, typically higher wages, . . . he will endeavor to compensate for any extra expense of that nature by negotiating for the elimination of benefits the employees have enjoyed in the past - - - contributing to cost, *such as providing loans or free coffee breaks*, and retention of employees during slow periods - - -."
>
> *NLRB* v. *General Stencils, Inc.*, 438 F.2d 894 (2 Cir. 1971)

It should be apparent that in the three-month period of time that preceded this election, the employer's terminal manager and the employees would have frequent opportunity for the free exchange of opinions. Such opinions could take the form of idle conversation, sarcastic remarks and remarks made in jest. It is inconceivable that such remarks could be construed as threats and intimidation. A remark such as "quit worrying about the mess" they were in with the union did not violate the Act. *Montgomery Ward & Co.*, 189 NLRB No. 21, 76 LRRM 1657 (1971). A comment that if the union won the election an officer would make it "hard as hell on them" did not violate the Act. *McCann Steel Co., Inc.*, 448 F.2d 277 (6 Cir. 1971). Conversation to the effect that there would be *possible* disadvantages to employees if the union won the election did not violate the Act, *Lenkurt Electric Co., Inc.*, 438 F.2d 1102 (9 Cir. 1971). A supervisor can lawfully engage in conversation with an employee on the merits of unionism. *Midwest Tool & Engineering Co.*, 192 NLRB No. 163, 78 LRRM 1122 (1971).

There is also an issue of credibility concerning the testimony of Statler. The majority of the alleged threats to Statler occurred prior to the election and prior to his

discharge. *It was only after his discharge that he came forth with the evidence desired by the union.*

The Courts of Appeals have formulated certain guidelines in reviewing cases of alleged interrogation:

> "A few isolated instances of questioning may not be coercive if there is no background of company hostility to the union. *NLRB* v. *Fuchs Baking Co.*, 207 F.2d 737 (5 Cir. 1953), *NLRB* v. *Armour & Co.*, 213 F.2d 625 (5 Cir. 1953). *Nor do a few casual questions violate Section 8(a)(1) if there is no evidence of threats of reprisal or promises of reward. NLRB* v. *Mississippi Products Co.*, 213 F.2d 670 (5 Cir. 1954). CF. *NLRB* v. *Harbison-Fischer Mfg. Co.*, 304 F.2d 738 (5 Cir. 1962) . . . ."
>
> *NLRB* v. *Camco, Inc.*, supra.

(3)

The Employer's Alleged Act of Transferring Silvertooth from His Own Truck to Ride As a Co-Driver with Alsip Did Not Violate the Act.

The Administrative Law Judge found that after May 23, 1972, Silvertooth was assigned to truck No. 3151 ("the old rig") with Alsip until July 6, 1972. It is further apparent, however, that the alleged "demotion" to "second driver" occurred on May 29, 1972. J.D., line 10, p. 8.

The reference to "demotion" and "second driver" would reasonably imply that Silvertooth's pay had been reduced if the company had been guilty of such action.

The following analysis of the Employer's Exhibit R-28 (Tr-631) reflects the earnings of all drivers for the period May 31, 1972, to August 31, 1972.

EMPLOYER'S EXHIBIT R-28

Alsip	$2,543.94
Anderson	3,767.72
Ash	—
Bateman	2,187.74
Birmingham	4,240.43
Burge	1,881.52
Clark	2,918.45
Coyle	1,886.85
Deaton	4,146.11
Denson	—
Ewen	418.22
Ezell	467.31
Frazier	—
Farmer	1,118.81
Green	2,980.50
Hatfield	2,690.99
Harris	1,812.25
Hedrick	3,834.04
Henson	98.39
P. Hyden	4,037.05
R. Hyden	3,493.62
Johnson	—
Joyner	3,524.67
Kellebrew	915.74
Landers	2,279.55
Leath	201.99

Leavell	895.74
Maass	3,600.99
Martin	1,241.45
Miller	2,980.90
Mills	101.39
Mitchel	707.93
Nail	—
Nolen	3,887.50
Owens	—
Peden	1,532.41
Reeves	3,623.40
Richardson	120.77
Ritter	4,651.29
Roberson	2,241.39
Sampson	2,117.25
Sharp	2,427.43
Silvertooth	2,922.41
Statler	1,746.58
Stephens	2,635.58
Storch	423.82
L. Thomas	3,018.86
M. Thomas	759.93
R. Thomas	1,722.62
Z. Thomas	1,638.56
Washburn	175.14
Watson	3,738.21

The statement of the Administrative Law Judge that "since both Alsip and Silvertooth were 'First Drivers' prior to this assignment, necessarily one or the other would have to suffer as a result of the assignment," J.D. line 37, p. 14 to line 39, p. 14, is not supported by the record. There has been no charge filed that Alsip was demoted to second driver by the alleged assignment.

As demonstrated by the Employer's Exhibit R-28 (Tr-631) and other exhibits, the drivers' earnings and job assignments vary greatly. In a similar situation it was held that the employer did not violate the Act by work assignments to union employees where *work assigned was not less desirable than other* work. *Carl J. Austad & Son, Inc.*, 163 NLRB 1, 64 LRRM 1246 (1967).

Further, a transfer or assignment of an employee does not violate the Act where it is not shown that such assignment adversely affected the employees' wages, hours, or working conditions and the transfer did not dissipate the union's strength. *Diana Shops of Washington State, Inc.*, 170 NLRB No. 54, 67 LRRM 1480 (1968).

It is also apparent from the exhibits that the alleged reassignment of Silvertooth was temporary. Temporary transfer of union adherents to another job will not violate the Act. *Fasco Industries, Inc.*, 173 NLRB No. 85, 69 LRRM 1380 (1968). When a company reduced the work hours of an employee below the hours he had worked in the year preceding, it was held that the company did not violate the Act in view of the fluctuation in employee's work hours from week to week and absent proof that other employees having like tenure, experience and duties worked more hours. *Elsa Canning Co.*, 161 NLRB 137, 63 LRRM 1292 (1966).

Even assuming there was a short period of time that the two union organizers were riding together in view of the isolated nature of the incident, a remedial order should not be issued. *Decker Disposal, Inc.*, 171 NLRB No. 124, 68 LRRM 1306 (1968).

Again the Administrative Law Judge relied on the credibility of Statler to reach the conclusion that Alsip and Silvertooth were assigned to ride together to insulate them from the rest of the employees.

(4)

The Employer Discharged Alsip for Cause Rather Than His Union Activity.

The Administrative Law Judge found that the suspension and discharge of Alsip was unrelated to the refusal of Alsip to make the trip with Nolen as a co-driver and also unrelated to his failure to be available for dispatch. J.D., line 36, p. 17 to line 39, p. 17. To reach this result the Judge had to discredit 100% the following testimony of the employer's terminal manager:

> "So a driver has to be available or somewhere around where we can reach him within a short period of time all of the time. (Tr-394) A driver is supposed to let the dispatcher know where he is at. If he is going to be out of pocket, in other words, he is supposed to call the dispatcher and tell him that he is going to be out of pocket, and supposed to tell him for how long. A lot of times we will use personnel around the terminal to load the loads. Then, if we already know where the driver is going to be, well, we can call him after the load is loaded. (Tr-394) I wasn't in the terminal the next morning and Donald Dawson told me that Roy Alsip refused to make a

trip with Larry Nolen. I talked to Mr. Alsip about this. On the 24th I talked to Mr. Alsip. I asked him why he refused to run with this man. (Tr-395) Mr. Alsip said that he wasn't going to run with 'the little hatchet-faced s.o.b.' I said, 'Well, you take a couple of days off and I will contact Enid and see what they want to do about this.' (Tr-396) I did not tell him to take 2 weeks off. (Tr-396) We had loads for Mr. Alsip to take following the 24th. We were trying to contact Mr. Alsip about the 28th, and could not find him. Then we called him on the 29th, the 30th, the 31st and the 1st. We talked to his daughter one time. She said she did not know where he was or when he would be in. I left word every time for him to call. Either I called or Curtis Craig called. Mr. Craig made these calls under my direction. I told Curtis Craig to keep on trying to locate Roy, to call him twice a day. I made notes of times and dates that they tried to locate Mr. Alsip." (Tr-398) [The witness identified Respondent's Exhibits 11 through 17 as being written memoranda concerning the attempts to contact Mr. Alsip]. (Tr-405)

"There has always been a company rule about being available for dispatch. (Tr-407) This rule has been in effect back when it was Bell Transport Company."

A union organizer has no special license to violate company rules.

". . . absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all. [Citations] *If the specific employee happens to be both inefficient and engaged in union activities that coincidence stand-*

ing alone is insufficient to destroy the just cause for his discharge."

NLRB v. *Soft Water Laundry, Inc.*, 346 F.2d 930 (5 Cir. 1965)

It requires no citation of authority in support of the principle that an employee is expected to obey company rules and orders particularly those relative to job assignments. *Engineering Building Products, Inc.*, 162 NLRB No. 546, 54 LRRM 1075 (1967). Company rules need not be in writing if they have been established by custom. It is indeed a novel contention that a union organizer can choose his job assignments at his pleasure. Alsip's testimony was credited to the effect that he had refused n the past to ride with other drivers and had never been admonished or punished for so doing. *In fact, none of Alsip's testimony appears to have been discredited.*

It should be recalled that Alsip offered testimony which was intended to corroborate the fabricated testimony of Storch, another employee who was discharged. Alsip's testimony to this effect was as follows:

"Q. When did he (Storch) call the yard?

"A. He called the yard just a little before 3:00 o'clock in the morning, I believe, because I was fixing to leave out.

"Q. On the 8th?

"A. Right.

"Q. What was the nature of that conversation?

"A. He was in trouble with his alternator.

\- - -

"Q. How far out was he?

"A. He was in Texarkana." (Tr-69, 70)

The credited testimony of employer's witness, John Smith, established that Storch had already returned from Texarkana and was in Longview, Texas, on May 7, 1972, at 3:15 p.m. (Tr-467) *Accordingly, there could have been no phone call from Storch in Texarkana to Alsip in Longview on May 8, 1972, at 3:00 a.m.*

The record is replete with alleged corroborative statements attributable to Alsip, Maass and Statler, all bolstering each other's testimony.

The employer submits that Alsip's testimony concerning his discharge should be discredited as to the existence of obvious company rules concerning dispatch procedures.

The Court will also note that Alsip was the only employee alleged to have been discharged for discriminatory reasons.

> "Many cases which hold against the Board involved the discharge of a single employee. See e.g. *NLRB* v. *Fox Mfg. Co.*, 238 F.2d 211 (5 Cir. 1956); *NLRB* v. *Birmingham Co.*, 262 F.2d 2 (1958); *Schwob Mfg. Co.* v. *NLRB*, 297 F.2d 864 (5 Cir. 1962); *Bon-R Reproductions, Inc.* v. *NLRB*, 309 F.2d 898 (2 Cir. 1962). In these cases there was no inference based on the percentage of union adherents discharged to rebut the employer's testimony."
>
> *NLRB* v. *Camco, Inc.*, supra.

It will further be noted that Alsip's discharge occurred after the election. Hence, such action could have had no direct impact on the results of the election.

(5)

The Employer's Terminal Manager's Alleged Conduct Does Not Warrant Setting Aside the Election.

General Counsel appears to have a dual purpose in making allegations covering conduct both before the election and after the election. In attempting to prove such acts, General Counsel seeks to set aside the first election and if unsuccessful, allege that a second election cannot fairly be held under the circumstances. Accordingly, a bargaining order should be issued.

The record in this case will reveal alleged conversations containing threats made to Alsip, Maass, Silvertooth and Statler. Maass and Silvertooth testified concerning various vague predictions by Anderson as to what would happen if the union won. Statler testified as to similar vague recollections of a conversation attending a request for a cash advance.

An election will not be set aside unless alleged coercive statements are part of a broad employer scheme to pressure employees into voting against the union.

The record at most reveals isolated interrogation over a period of three months. In such a situation, the Board and courts have held as follows:

> "Single instance of interrogation of one employee does not warrant setting election aside."
>
> *Worzalla Publishing Co.*, 171 NLRB No. 34, 60 LRRM 1038

> "Employer did not interfere with representation election despite allegation that three supervisors made threats and coercive statements to employees. . . . *and*

they were not part of any broad employer scheme to pressure employees into rejecting the union."

Dyersburg Cotton Products, Inc., 168 NLRB No. 151, 67 LRRM 1047

"Incident too isolated to warrant setting aside election lost by union."

Tennessee Handbags, Inc., 179 NLRB No. 161, 72 LRRM 1576

"Employer did not violate LMRA or interfere with representation election despite interrogation and an allegedly threatening statement by lead man since these were isolated instances *insufficient to affect results of election*, it appearing that conduct in question affected two employees in complement of 122. . . ."

Field Container Corp., 178 NLRB No. 82, 72 LRRM 1156

The employer submits that the record in this case does not indicate employer pre-election conduct which coerced the employees in rejecting the union.

(6)

A Bargaining Order Is Not Necessary to Effectuate the Purpose of the Act.

In *NLRB* v. *Gissel Packing Co.*, supra, this court stated that henceforth:

"The key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election. . . . When the unfair labor practices are minor and less extensive

with minimal impact on the election machinery, a bargaining order is not warranted."

The only evidence of such practices must be found in the dubious testimony of three disgruntled drivers, Maass, Statler, and Silvertooth.

These cases fall into a category of post-*Gissel* cases which may be characterized as follows:

"(3) Where the evidence establishes that the unfair labor practices produced little or no impact upon the employees allegiance to the union.

- - -

"Here the organizational drive proceeded at an accelerated pace following the employer's commission of prohibited practices."

Arbie Mineral Feed Co. v. *NLRB*, 438 F.2d 940 (8 Cir. 1971)

In the foregoing case, the following events took place: ". . . supervisor Penrod asked Wogan if he was a union member. A few days later foreman Moore asked Wogan what had transpired at the union meeting. During this conversation and on subsequent occasions Moore told employees that it would cause employees a loss of money through loss of overtime work, Christmas bonuses and profit sharing and that those employees campaigning for the union could be discharged. . . . The Board deemed these conversations to be coercive and violative of Sec. 8(a)(1).

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"On December 5, 1968, Arbie discharged Charles Wogan. . . The general counsel proved Wogan's discharge constituted a somewhat typical Sec. 8(a)(3) violation.

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"In this case not marked by any outrageous employer conduct . . . indicates that the unfair labor practices did not tend to undermine a union majority."

Arbie Mineral Feed Co. v. *NLRB,* supra.

In a similar proceeding, the Board has held:

"In our view, this case is properly included in that category of cases where the court has indicated that the unlawful conduct will not sustain a bargaining order. Respondent's unfair labor practices were neither pervasive nor extensive, involving only 3 of the 78 employees."

Abitibi Corporation, 198 NLRB No. 176, 81 LRRM 1143

In this case the alleged unfair labor practices arising before the election involved three employees out of approximately 65.

In a similar case, the same Court of Appeals has stated:

"Each case must therefore necessarily be evaluated in its own factual context, with due consideration being given to the *time, place, and manner* in which the disputed inquiries were made. - - - There is, moreover, a pronounced absence of any established pattern of employee interrogation. Here, the questioner, store manager Davis, worked side by side with the small group of employees and, as demonstrated by the record as a whole, an atmosphere of marked informality pervaded their relations. Under these circumstances, it would be unreasonable to infer that Davis' remark to Johnson carried with it an implied threat of reprisal. We are therefore unable to conclude that Davis' isolated inquiry represented the degree of interference, restraint, or coercion of employee organi-

zational rights necessary to substantiate the Board's finding of a section 8(a)(1) violation. See *NLRB* v. *Camco, Inc.*, supra; *NLRB* v. *Hill & Hill Truck Line, Inc.*, 5th Cir. 1959, 266 F.2d 883. Accordingly, the Board's petition for enforcement of its order is hereby denied."

NLRB v. *O. A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5 Cir. 1967)

The Court is urged to make a strict application of its *Gissel* ruling to this case which includes reference to the sufficiency of evidence necessary to support such an order.

"The order is not a traditional punitive remedy, but is a therapeutic one. *It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice.*"

NLRB v. *American Cable Systems*, 427 F.2d 446, 5 Cir. 1970 cert. denied, 91 S.Ct. 356, 27 L.Ed. 2d 266.

CONCLUSION

In conclusion, the company submits that it has won a Board supervised election. Any alleged illegal activity which preceded the election was at most de minimis and unsupported by substantial evidence.

Respectfully submitted,

CLIFF W. RATNER
PAYNE H. RATNER
HUGH E. HACKNEY

Attorneys for Groendyke Transport, Inc., and Ann Myers Bell d/b/a Bell Transport Company

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C

Cases 16—CA—4886, 16—RC—5991

GROENDYKE TRANSPORT, INC. AND ANN MYERS BELL d/b/a BELL TRANSPORT COMPANY

and

SOUTHERN CONFERENCE OF TEAMSTERS, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Phillip R. Jones, Esq., David Richeson, Esq., and *Jay C. Counts, Esq.,* all of Fort Worth, Texas, for the General Counsel.

G. Williams Baab, Esq., and *Jim Hicks, Esq.; Mullinax, Wells, Mauzy & Baab, Inc.,* of Dallas, Texas, for the Charging Party.

Cliff W. Ratner, Esq., and *R. R. Barnes, Esq.; Ratner, Mattox, Ratner, Ratner & Barnes,* of Wichita, Kansas, and *Mr. Max E. Barton,* of Enid, Oklahoma, for Respondent.

DECISION

PAUL E. WEIL, Administrative Law Judge: The Southern Conference of Teamsters, affiliated with Inter-

national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, on April 14[1] filed a petition with the Regional Director for Region 16 of the National Labor Relations Board, hereinafter called the Board, seeking an election among certain employees of Bell Transport Company located at Longview, Texas. The Regional Director caused a hearing to be conducted on the petition on May 26 and on June 14 issued a Decision and Direction of Election which was conducted on July 16. Twenty-six employees voted for the Union, 26 employees voted against the Union, four ballots were challenged and, within a few days, both the Union and the Employer filed objections to the election. On August 10, the Union filed a charge with the Regional Director, alleging that Groendyke Transport, Inc. and Ann Myers Bell d/b/a Bell Transport Company, hereinafter called Respondent, violated Section 8(a)(3) and (1) of the Act by the discharge of an employee, Storch, on May 24, and another employee, Statler, on July 25. On August 29 the charge was amended dropping the allegation with regard to Statler and adding an allegation that Respondent altered the job status of employee Silvertooth for discriminatory reasons and an allegation of refusal to bargain in violation of Section 8(a)(5) of the Act. On September 19, the Regional Director issued a Supplemental Decision in the representation case setting forth the fact that objections were filed and attaching them, and that ballots were challenged and ordering a hearing to investigate both objections and challenges.

On September 28, the Union filed a second charge (Case 16—CA—4943) alleging the discriminatory discharge of employees Alsip and Maass and on the following day

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1. All dates hereinafter are in the year 1972 unless otherwise specified.

the Regional Director issued an order consolidating the original charge with the representation case and alleging discrimination by Respondent in the discharge of Storch and the alleged demotion of Silvertooth as well as various allegations of interference, restraint and coercion by the terminal manager, Gail Anderson. On October 19 the Regional Director issued a second order consolidating cases, this time consolidating Case 16—CA—4943 with the representation case and with Case 16—CA—4886, and added an allegation that Respondent discharged Roy Alsip in violation of the Act. By its duly filed answer, Respondent denied the commission of any unfair labor practices. The matter came on for hearing before me at Tyler, Texas, on November 7 and 8. On November 9, because of the absence of a witness deemed essential by the General Counsel, the matter was continued until December 6 to be resumed at Longview, Texas, the site of Respondent's terminal. The hearing concluded on December 7.

All parties were present and represented by counsel at the hearing. All parties had an opportunity to call and adduce relevant and material evidence with regard to the allegations in the complaint, the challenges, and the objections. All parties waived oral argument at the close of the hearing. Briefs have been received from the General Counsel, the Charging Party and Respondent.

The Issues

A basic issue in the entire proceeding is whether the Employer has a duty to bargain with the Union. There are sufficient challenges to determine the election. If, after consideration of the challenges and the opening of such ballots, such determination should indicate the majority of ballots have been cast for the Union, the Employer's objections must be considered. If the Employer's objec-

tions are overruled, the Union will be certified which disposes of the issue. On the other hand if the Union does not win as a result of the determination of the challenges, the Union's objections must be considered. If they are found to have merit the election will be set aside. At this point the General Counsel argues that the unfair labor practices allegedly committed by Respondent are of such nature that under the decision of the United States Supreme Court in the *Gissel* case[2] a bargaining order should issue. To this end the General Counsel introduced evidence that the Union represented a majority of the employees at the time it first sought recognition from Respondent.

Finally, no matter what determination results in the representation case, the alleged unfair labor practices must be considered. These allegations include allegations of threats and interrogation by Gail Anderson, the Longview terminal manager for Respondent, whether Charles Storch and Roy Alsip were discharged because of their union activities and whether R. B. Silvertooth was demoted from the position of first driver to that of second driver and, if such demotion occurred, whether it was discriminatory within the meaning of Section 8(a)(1) and (3) of the Act.

On the record as a whole and in contemplation of the briefs I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is a business association doing business as a carrier in interstate commerce among the several states of the United States with a terminal located at

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2. *N.L.R.B.* v. *Gissel Packing Company, Inc.*, 395 U.S. 575.

Longview, Texas, which is the site of the matters raised in the instant case. In the operation of its business Respondent performs services in states of the United States other than the State of Texas valued in excess of $50,000 annually and operates as a conduit in interstate commerce.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Challenges

As set forth above, the election resulted in 26 votes being cast for the Union, 26 votes being cast against representation by the Union and 4 challenged ballots. The four ballots challenged were those of Curtis Craig, Raymond Lilly, Carl Wilhite, and Roy Alsip.

Curtis Craig was employed until June 20, 1972, as a dispatcher at Groendyke's[3] Channelview, Texas, terminal. On May 31, a memorandum was addressed to Craig by Alvin L. Hamilton, a Groendyke vice president, stating "In line with our conversation, it is agreeable for you to transfer from Houston to Longview as the dispatcher effective as of this date. Salary will be $850.00 per month. Your moving expenses will be paid." Craig testified that he was on the Channelview payroll through the pay period

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3. It should be noted that the "Employer" herein is a business association of Groendyke Transport, Inc. (herein referred to as Groendyke) and Ann Myers Bell d/b/a Bell Transport Company. At the time of all of the actions undertaken herein Groendyke was operating Respondent under a temporary authority granted by the ICC. Whether that authority still exists or has been made permanent is not known. It appears that Groendyke operated Respondent as part of its system of terminals.

ending May 31, and that he remained in Channelview until June 14 because of the absence there of the terminal manager whose place he was taking, but that he considered himself an employee at the Longview terminal from May 31.

The Regional Director's Decision and Direction of Election dated June 14 provided that the eligibility date should be the payroll period last preceding the Decision and Direction of Election. The evidence reveals that Respondent's payroll periods extend from the 1st through the 15th and the 16th through the end of the month. Accordingly, the eligibility date would be the payroll period ending May 31. The *Excelsior* list furnished by the Employer did contain the name of Curtis Craig but also contained the name of Vertus Brightwell as dispatcher. The Board's longstanding rule is that an employee slated for transfer into a proposed unit is eligible to vote if in fact he is transferred to and performing the duties of the unit during the determinative payroll period. It is clear that Craig did not perform any duties in the unit after June 14. Accordingly, he was not a member of the unit during the determinative payroll period and the challenge to his ballot must be sustained.[4]

Raymond Lilly and *Carl Wilhite* were drivers at Respondent's Mt. Pleasant, Texas, terminal. The Mt. Pleasant terminal did not have a dispatcher or manager; most of the trucks driven by drivers at that terminal were owned by Lilly and Wilhite and used by the Employer on a lease basis with payment based on a percentage of the revenue attributable to each truck. Neither Lilly nor Wilhite testified in the hearing. Longview Terminal Manager Anderson testified that many of the drivers at the Mt.

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4. *United States Rubber Company*, 80 NLRB 1039. See also *McDonald Printing Company*, 81 NLRB 481.

Pleasant terminal had been hired on the recommendations of Lilly and Wilhite and indeed all of the drivers that they have recommended have been hired other than those who failed to meet the Department of Transportation physical requirements for over-the-road drivers. While neither Lilly nor Wilhite had specific authority or responsibility concerning the movements of loads at the Mt. Pleasant terminal, Anderson testified that they took this responsibility and saw to it that loads moved, replacing drivers if necessary by calling out other drivers to handle the loads.

It is clear that Lilly and Wilhite have the authority to responsibly recommend drivers for hire; it is also clear that their recommendations with regard to any other terms or conditions of employment would enjoy practically the same authority as that of Anderson who is undeniably a supervisor. I find that Lilly and Wilhite are supervisors within the meaning of the Act and that the challenges to their ballots should be sustained.

Inasmuch as the names of Lilly and Wilhite appeared on the *Excelsior* list and the Union did not object until the election, Respondent contends that by its inaction the Union has waived its right to challenge them.[5] In support of its argument the Employer states, "in an analogous case, a union has been held to be guilty of a waiver by inaction in checking such a list," citing *United States Consumer Products,* 164 NLRB 1187. I find nothing in the cited case relating to the issue for which it is cited, nor any discussion of waiver in that case. The Employer also cited *Pyper Construction Company,* 177 NLRB 707, in support of the statement that "if the employees' names

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5. Lilly's and Wilhite's names appear followed simply by the designation "driver," with no indication of their connection with the Mt. Pleasant terminal.

referred to herein had not appeared on the *Excelsior* list then these challenges would have had merit." That case does not deal with a so-called *Excelsior* list but rather with a "*Norris-Thermador*" list[6] which is in effect a stipulation between the parties to an election resolving, as between themselves, all issues of eligibility prior to an election. The Board will consider such an agreement only when it is in the form of a written and signed agreement which expressly provides that the issues of eligibility resolved therein shall be final and binding on the parties. No such agreement or list appears in the instant case.[7]

I see no warrant for accepting Respondent's argument that the *Excelsior* list put the burden on the Union to mount a challenge raised by the inclusion or exclusion of the names from the list prior to the election, under pain of being deemed to have waived such challenge. The *Excelsior* rule was adopted to enable all parties to a Board election to communicate with the eligible voters. The Board has in a number of cases found that the omission of persons from an *Excelsior* list by the employer or the addition of ineligible employees to the *Excelsior* list by an employer does not violate the order under which the list is issued as long as the omissions or additions are not of such a substantial number that the list is not fairly representative of the unit. I reject the Employer's contention that the Union has waived its rights to challenge the votes of Wilhite and Lilly and I find that as they are supervisors within the meaning of the Act the challenges should be sustained.

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6. *Norris-Thermador Corporation*, 119 NLRB 1301.

7. It should be noted that in a recent case, *Laymon Candy Company*, 199 NLRB No. 65, the Board sustained a challenge to the ballot of a supervisor notwithstanding the fact that the parties agreed on a *Norris-Thermador* list that the voter was eligible.

Roy Alsip was the Union's election observer at the polls. No evidence was taken at the hearing, all parties agreeing that there was no issue between them as to the facts behind the challenge. An affidavit submitted by the Employer with its objections to the election states that after the election concluded the election sign was taken down and the observers were invited to attend the counting of the ballots. They did so and the ballots were counted disclosing that 26 employees had voted for the Union and 26 against and 3 had voted challenged ballots. At this point Alsip announced that he had not voted. The Board agent conducting the election called someone, apparently his superior, and announced that Alsip would be permitted to vote under challenge. Alsip cast a ballot which was sealed in an envelope and challenged by the Board agent. Clearly the secrecy of Alsip's ballot was not violated.

Whether a voter may be permitted to cast a ballot after the polls have closed is left to the reasonable discretion of the Board and its agent conducting the election. In *Glauber Water Works,* 112 NLRB 1462, the Board held that ballots would be counted where the Board agent in charge of the election, in the exercise of his discretion, reopened the polls to take the challenged ballots of six employees, five of whom could not get away from their jobs during the voting period to vote. However, the Board stated, "We believe it would have been the better practice if the Board agent had followed the rule [not to extend voting periods beyond the time specified in the notice of the election] in this case." In *N.L.R.B.* v. *Wilkening Manufacturing Company*[8] the Court found an abuse of the Board's discretion to refuse to take the late cast ballot

8. 207 F.2d 98 (C.A. 3) denying enforcement of 100 NLRB 1201 and 96 NLRB No. 13 (not published).

of an employee who appeared within 5 minutes of the closing of the polls.

In *Hanford Sentinel, Inc. d/b/a Hanford Sentinel*, 163 NLRB 1004, the Board sustained an objection that the Board agent declined to take the ballots of two employees who appeared at the polls immediately after they were closed. There the Board found that the agent, in the proper exercise of his discretion, should have permitted the two employees to cast their ballots.

In *Westchester Plastics of Ohio, Inc.*,[9] the Board and the court approved the action of a Board agent who permitted an employee who was 1 minute late to cast his ballot. As the court pointed out in enforcing the Board's decision, in each of the cases the Board has evaluated the circumstances of the late voting in order to determine whether the agent exercised his discretion correctly. The evaluation in each dealt with: (1) The reason the employee was late; (2) how late the employee was; (3) how long the voting period was; and (4) whether the ballot box was opened or the tally commenced at the arrival of the employee.

Applying the same tests to the instant case no excuse is given for the failure of the employee to vote within the voting period. He was present and indeed was the observer for the Union during the election. The polling period was apparently adequate; there is no indication that employees were left waiting to vote when the time period was completed. The decision of the employee to cast a ballot took place well after the polls had closed. The polling place had been dismantled to some extent and the ballot box had been opened, the ballots counted and apparently the tally completed at the time he indicated

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9. 165 NLRB 219, enfd. 401 F.2d 903 (C.A. 6).

that he wanted to cast his ballot. While, as the court pointed out in *Wilkening Manufacturing Company, supra,* the Board must give employees an opportunity to cast their ballots and make known their preferences with regard to union organization, there must be a limitation within which the Board's reasonable rules should be followed. I infer from the cited decisions that when the ballot box has been opened and the tally concluded, any employee should thereafter be precluded from the right to cast his ballot. If an employee has not been able to make up his mind to vote until he finds out the result of his fellow employees' votes, I think he has waited too long. I recommend that the challenge to the ballot of Alsip be sustained.

I have recommended that all four challenges be sustained. Accordingly, the Union has not obtained a majority of the valid votes counted. Therefore it is not necessary to consider the objections to the election filed by the Employer/Respondent herein. However, those objections filed by the Union must be considered.

IV. The Union Objections

The Union filed objections to the conduct of the election on the following grounds: (1) That all eligible voters were not permitted to vote their ballots in secret; (2) that the Employer gave work assignments to employees making it impossible for them to attend the polls and did not provide substitute or mailed ballot opportunity; and (3) by the above and by other acts of interference and coercion, employees were denied the opportunity to cast their ballots in accordance with the rights under the Act.

No evidence was adduced by the Union, or by anyone else for that matter, that any eligible voters were restrained

in any regard in voting their ballots in secret. No evidence appears that the Employer gave work assignments to employees which made it impossible for them to vote. There is no evidence that any employee who wanted to vote did not succeed in doing so. Accordingly, the first two grounds for objections set forth above must be dismissed for failure of the Petitioner to support them with evidence. The third ground, relating to unspecified acts of interference, restraint and coercion, has reference, according to the statement of Petitioner's counsel at the hearing, to the matters alleged as unfair labor practices in the complaint portion of this case. As I recited above, the complaint alleges various acts of interference, restraint and coercion between April 1 and August 9, the discharges of Storch on May 22, Alsip on September 23 and the discriminatory demotion of Silvertooth on May 29. Only those actions of Respondent between April 14 when the petition was filed and July 14, when the election was conducted, would be considered for the purposes of the objections within the Board's normal rules. These allegations will be considered in the next section together with the other unfair labor practice allegations.

V. The Alleged Unfair Labor Practices

The organizing campaign was initiated by Roy Alsip, one of Respondent's drivers, who contacted the Union early in March and, after holding a meeting, determined that there was enough interest to warrant an attempt to get authorization cards signed. The first cards were signed on March 30 by Alsip and another employee, and thereafter the majority of the employees signed cards in April and May. Respondent, through its terminal manager, Anderson, became aware of the organizing attempt early in April. Possibly the first solid information Anderson received was

from one of the drivers, Paul Hyden, who came to Anderson and told him that the employees were organizing.[10]

Alsip testified that shortly after the first of April, Manager Anderson called him into his office and asked him if he had heard anything of the rumor of the Union coming into the Company. Alsip told him it wasn't a rumor anymore and stated that the organization had commenced. Anderson asked who the instigator was and Alsip acknowledged that it was he, to which Anderson answered that Alsip was "a sorry - - -" for bringing the Union in; that it would cause him to lose his job. Anderson was on the witness stand on two occasions. First he was called by the General Counsel as a 43(B) witness, and later in the proceeding was called by Respondent as its main witness. On the latter occasion he denied having any conversation with any employee concerning the Union, and denied making any of the statements attributed to him during the hearing. On cross-examination he was reminded that when he was testifying under 43(B), he admitted that Hyden had told him about the union organization whereupon he stated that he made no answer to Hyden, that all the talking was done by Hyden. Anderson's testimony throughout was characterized by an evasiveness that seriously reduced his credibility. I credit Alsip's testimony concerning the above incident, and I further credit the testimony of Alsip that on succeeding occasions when Alsip had mechanical trouble with his truck, Anderson told him, in essence, that if he hadn't gotten involved with the Union, he could expect to be assigned a new truck. Anderson denied any such statement and denied that Alsip ever had any serious mechan-

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10. Hyden signed a card on April 2.

ical trouble with his truck.[11] Alsip testified that he had been assigned truck No. 3151, an old truck, shortly after the union organization came to Anderson's attention. Alsip placed this on March 8 but log analysis records placed in evidence reveal that until April 13, truck No. 3151 was driven by driver Silvertooth who thereafter drove No. 3163 and No. 3162. The record does not disclose what truck Alsip drove prior to April 13. Respondent, which has the records under its control, took no steps to controvert Alsip's testimony. Accordingly I conclude that he had been driving a newer truck until April 13. Alsip also testified credibly that on occasions Anderson would "catch" Alsip talking with fellow workers and Anderson would tell them that if they didn't leave Alsip alone, they would wind up in trouble, too. Alsip gave no dates for these conversations. As he could not recall the day on which any of them occurred, it is not possible to attribute any of the incidents to any of the allegations in the complaint. Accordingly, I make no finding that these somewhat ambiguous warnings constitute unfair labor practices.

Employee John Maass, a driver, testified that after the second organizational meeting which took place early in April Manager Anderson questioned him whether he had attended the union meeting. Maass answered that he had done so and Anderson asked who had been there. Maass answered that Hyden had already told him that he was giving Anderson the names and therefore Anderson knew who had been at the meeting. Anderson said that

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11. In rebuttal Alsip produced a copy of a bill dated May 9, 1972, for repairs to his truck by a shop in Memphis, Tennessee, totaling over $1,000. It appears that Respondent was unaware that Alsip had retained a duplicate copy of the repair bill which he submited to Respondent. Alsip was then driving truck No. 3151 which is a 1970 model, Peterbuilt truck.

Maass could get in trouble over the Union and this ended the conversation. Three or four weeks later, which would have been around May 1, Anderson came up to Maass who was talking to Alsip and told him that if he would keep hanging around with Alsip he would get in trouble. This is apparent corroboration of Alsip's testimony that Anderson made such statements to employees with whom Alsip was talking. I think the statement is too ambiguous to warrant an inference that Anderson was threatening Maass with relation to union activities. Accordingly, I find no violation in this.

On the day of the election Maass drove into the terminal to check in prior to voting. Anderson on this occasion said "we won't get those new trucks if the Union is voted in." This had reference to a rumor that the Longview terminal was to get several new trucks. Maass testified that before his termination one new truck had been delivered.

Although Anderson denied the statements attributed to him by Maass I credit Maass and find that these statements were made. I further find that at another time before the election and after the commencement of the organizational campaign Anderson asked Maass if he hadn't had trouble on a job before related to the Union. Maass admitted that he had and Anderson asked if he had been run off the job. Maass said no but he had left it. Whereupon Anderson said, "Well, you could do the same here." The General Counsel contends that this testimony, which I credit, reveals a violation by Anderson; I conclude that Anderson was in fact threatening Maass in violation of Section 8(a)(1) of the Act that he would have trouble because of the union organization.

A hearing was held on the representation petition on May 26. Shortly before that date driver Silvertooth

was in the terminal office and Anderson asked him what he thought about the Union. Silvertooth gave him an ambiguous answer and Anderson apparently did not follow up his questioning.

After the election Silvertooth and Anderson were discussing the fact that the vote had split evenly and that the election could go either way. Silvertooth somewhat maliciously stated to Anderson that if the Union won Dispatcher Craig would probably get Anderson's job, and then commented that if the Union lost Alsip and Silvertooth would probably be the first ones to be run off. To this remark Anderson merely nodded his head. The General Counsel contends that by nodding his head Anderson in effect threatened Silvertooth with discharge; I conclude that nothing more can be inferred from the incident but that Anderson was going along with Silvertooth in his "kidding" about the possible results of the election. I recommend that the complaint, insofar as this incident is alleged to be a violation, be dismissed.

Employee Statler testified that some time late in June or early in July he went into the terminal office to ask for an advance on his wages. While Anderson was writing a check, he stated that if the Union came in there would be no more cash advances, and pointed out to Statler that Statler was "a poor boy," that he gave him a job and took him in and treated him like a son, and he hoped that Statler would remember that when the vote came up. Anderson said that there would be quite a few people run off because of the Union.

A few days before the election Anderson met Statler in the outer office and asked him if he had seen the election notices; he also asked Statler who he was voting for. Statler responded that he did not know. A couple of days later Statler ran into Anderson in the shop and

Anderson expressed himself as being angry with Alsip. At that time Anderson said that he had Alsip and Silvertooth running together, and that they could run up and down the road together and talk about the Union and that they would be together when they left. Anderson said he already had run off Mr. Storch, and J. C. Maass would be next.

On election day after the voting, Statler testified he was talking to Craig about a dispatch when Anderson walked up to him. Statler was "sure is a lot of confusion around here today." Anderson answered "yeah but it's not going to be any longer. I've got those kind of suckers where I want them now." At this point Craig asked Anderson what tractors had hot water hookups on them and Anderson named them off, but left off tractor No. 153 which George Joyner, another union advocate, was driving, Statler reminded him of No. 153 and Anderson answered "yeah he's driving it for the short time he's going to be here too."[12] I credit Statler although Anderson denied all of the above incidents except that he had given Statler an advance. Statler is no longer employed by Respondent. Respondent contends that he is incredible because he was actuated by malice against the Respondent in his testimony. In support of this assertion Respondent, on cross-examination of Statler, brought out that he had come forward with his testimony at the request of Silvertooth after Statler's discharge; that Silvertooth had asked him if he knew of any incidents which would help out the men on whose behalf charges had been brought and stated that as a result of the instant case Statler might be able to get his job back. While it appears from this testimony that Statler at the time he first spoke to the

12. The record does not reveal whether Joyner is still employed by Respondent.

Board agent had some interest in the litigation, it no longer appears to be the fact. On the witness stand Statler's demeanor was that of a man telling the truth. The record reveals that Statler is no friend of Alsip, who at one time refused to drive with him because he disliked him. I had the impression that Statler was attempting to tell the truth as he recalled it with candor. I credit his testimony and I find that the statements attributed by him to Anderson were made.

The Discharges

The first employee whose discharge is alleged to have violated the Act is *Charles Storch.* On May 25, Charles Storch received a letter written on May 22, at Respondent's Enid, Oklahoma, office, advising him that he was terminated as a driver effective May 24. The letter stated that he was terminated because he had willfully falsified his logs, on May 7 and 8. According to Storch's story he was driving from West Memphis, Arkansas, to Longview on May 7. When he arrived at Texarkana, at 5 in the afternoon, he had trouble with the electrical circuit of his truck. He attempted to find the source of the trouble without success and then decided because it was a Sunday evening and there was a considerable amount of passenger traffic on the road to remain where he was until morning. Storch testified that he slept in the back of his truck until 2 o'clock in the morning, at which time he awakened and decided to try to call the company office in Longview. When he telephoned he reached Alsip who was preparing to take a load out. Alsip advised him that from his description it was not indicated that his truck would be disabled and he should drive on in. Accordingly he drove in to Longview without further trouble, arriving at 5 a.m. on May 8. Storch was corroborated by Alsip who testified that he received a phone call at

the company terminal between 2 and 3 a.m. on May 8 and consulted with Storch who told him of the trouble he was having. Alsip advised Storch that it sounded as though the alternator was bad and that he could drive on in to the terminal. Alsip did not see Storch again until that afternoon when Alsip had returned from wherever he was going and Storch was about to leave on another trip.

John Smith who stated that he is a "safety engineer" for Respondent testified that his duties include checking vehicles on the road, checking the drivers' logs and checking equipment. It appears that his job includes driving over the roads normally used by Respondent's equipment and making observations of the driving of company equipment. Sometimes Smith stops the equipment and checks the logs; other times he merely makes reports of the habits of the drivers as he observes them. His reports are turned in to the safety director, William Knight. Smith testified that on May 7 he observed the truck and trailer which he later learned to have been driven by Storch, at 11:30 a.m. while he was parked in Malvern, Arkansas, at a truck stop. He followed the truck until it pulled into a rest area near Prescott, Arkansas, at 12:15 p.m., where he passed the truck and stopped in Prescott. Soon after that the truck passed him again at Prescott. Heading south Smith saw the unit again at 1:30 p.m. in Nash, Texas, and at 3:15 p.m. he saw it in Longview at the fuel pumps in the company yard.

Smith denied that he knew who was driving the "rig" or that he had any particular interest in Storch's driving. Storch testified that on May 8 after he had laid over in Longview he was dispatched in the early afternoon and that he checked his truck and found that the alternator had been repaired. He testified that a mechanic

told him that the alternator had come loose and required only to be fastened down.

After the trip each driver is required to file, with the papers concerning his trip, a report on the mechanical condition of his vehicle. Respondent produced Storch's report after this trip. It bears the date May 7. The report shows a checkmark indicating disapproval of the panel instrument gauges and states as the reason for disapproval "panel gauges/tachometer and speedometer cable twisted off." There is no indication on the report of trouble with the electrical system. Respondent stated that its records show no repair work done on the truck by its maintenance staff after the May 7 trip. No explanation is offered by Respondent as to what would be gained by Storch's falsifying his arrival 14 hours later than it actually took place, and none is apparent. Storch's pay would not be affected, nor would his driving hours under either version. The General Counsel contends that Smith's reports are false and that the entire incident was staged for the purpose of giving an excuse to discharge Storch. Smith appeared to be truthful in his testimony and there appears to be nothing out of the way in his activities or reports. On the other hand, assuming that Storch was telling the truth, it does not appear likely that he would not have made some mention of the trouble with his electrical system in the mechanical condition report that he filed on his return. Also, the fact that that report, which is filed at the termination of the trip, is carefully made out, yet bears the date May 7, which coincides with Smith's report, rather than May 8, which is the date on which Storch testified he returned, tends to corroborate Smith's story rather than Storch's. While Alsip's testimony appears corroborative of Storch, Alsip admitted that he did not see Storch and had no way of knowing from what point Storch was calling other than the fact that Storch

said he was in Texarkana. On the record as a whole, I find that the General Counsel has not produced a preponderance of the evidence in support of his allegation that Storch's discharge was discriminatory. There is no contention assuming that Storch's logs were falsified, that his discharge was nevertheless discriminatory. Accordingly I find that the General Counsel has failed in its burden of supporting this allegation with a preponderance of credible evidence and I must recommend that the complaint be dismissed insofar as the discharge is alleged to be a violation of Section 8(a)(3) and (1) of the Act.

R. B. Silvertooth, Storch and Alsip attended the representation case hearing with the union representative. Accordingly there was no question that Respondent was aware of their union adherence.

On the Monday following the Board hearing, when Silvertooth came to work, he found that his truck had been dispatched to the man who had been driving with him and that he had been bumped back to second driver. He testified that the Company has two kinds of drivers, first and second drivers. They are paid at the same rate but the first drivers are usually the senior men and they have trucks regularly assigned to them. In the event a trip is of such a nature that it has to be accomplished with greater speed than a single driver can drive, a second driver is dispatched on the truck and the two drivers take turns with one sleeping in the berth on the truck. On these occasions, 25 percent of the charge for the trip is divided between the drivers and each receives 12-1/2 percent. When a driver makes a trip alone he receives 20 percent of the value of the trip. In addition, according to Silvertooth's testimony corroborated by that of the other drivers that testified, the "first driver" usually drives the truck to pick up the load and bring it back to the

terminal, from which it is dispatched to points all over the country. The second driver is not normally assigned or does not normally take the load until the terminal departure. The average additional emolument for picking up the load and returning it to the terminal is somewhere around $30 according to the testimony of the drivers. Since the representation hearing, according to Silvertooth, he had been dispatched only as a second driver which has led to a decrease in his income. The General Counsel contends that this decrease and the demotion from first to second driver constitute a violation within the meaning of Section 8(a)(3) of the Act.

The Respondent on the other hand contends that it has no such thing as "first drivers" and "second drivers" but that when two drivers are attached to a truck they are referred to as "codrivers." They share equal responsibility and the additional emoluments resulting from picking up the loads and delivering them to the terminal as well as for making trips individually are divided between them or are dispatched by Respondent on the basis of the number of hours of driving each of the codrivers has had.

Respondent adduced various records in an attempt to show that no significant difference appeared between Silvertooth, Joyner who had been his codriver and Watson who later drove the truck which had been assigned to Silvertooth and Joyner. Whatever else these records demonstrate, they demonstrate that in fact trucks are, for periods of time, principally driven by a single driver and that there is a greater "turnover" among the codrivers with the driver than among drivers with a truck. A more significant demonstration appears however and that is from March 1, when the records start, until April 13. Silvertooth normally drove truck No. 3151 or No. 3155,

with driver Condwell as his second driver between March 8 and March 18, and Johnston as a second driver from March 29 until April 6. Joyner or Jayner became his second driver on April 12 and continued as such for one trip; then the two of them together switched to truck No. 3163 and then No. 3162, driving together until May 10. Silvertooth continued to drive No. 3162 for two trips alone thereafter which took him up to May 23, and then after a 3-day trip with *Van Deaton* as a second driver he was assigned to No. 3151 with Alsip. Silvertooth continued to drive with Alsip, with the exception of one short trip, until July 6. All his driving with Alsip, with the exception of one trip, appears to have been in rig No. 3151 the "old" rig Alsip testified had been assigned to him after Anderson learned that Alsip was organizing the Union.

It is clear from the various records adduced in evidence that whether a driver is called a codriver, first driver, or a second driver, the more senior drivers normally are assigned trucks and are in a position to achieve higher earnings by reason of their availability to travel on the single loads and to do the loading. Codrivers or second drivers are not assigned trucks; while they earn as much as the first drivers for the hours and miles that they drive with the first drivers, they drive alone only when there is a truck free because the first driver assigned to that truck cannot make the trip for one reason or another.[13] It is apparent that for most of the time after the hearing in the representation case, Silvertooth's earnings were less than those of the drivers with whom he rode or the drivers to whom his former truck had been assigned. But the error is in trying to determine whether

13. This might of course be frequent depending on the utilization of trucks and drivers, and the amount of business.

Respondent has violated Section 8(a)(3) by comparison of final earnings. The record suggests, in the testimony of Statler which I have credited above, that the reason for the transfer of Silvertooth from a truck of his own to codriver or second driver, call it what you will, with Alsip was to insulate the two leading union adherents from the other employees. Anderson is quoted to have said, "if they want to talk union let them talk union to each other." Since both Alsip and Silvertooth were "first drivers" prior to this assignment, necessarily one or the other would have to suffer as a result of the assignment. But, the assignment entered into for discriminatory reasons and in violation of Section 8(a)(1) of the Act would be violative whether or not a lessening of the earnings of Silvertooth took place. Since the violation resulted in the diminution of Silvertooth's earnings, the remedy therefore should require that Respondent make him whole and I will so recommend. But more records than I have before me are necessary to determine the extent to which he has suffered such a diminution. It is enough, as I find, that Respondent transferred Silvertooth from his own truck to ride as a codriver with Alsip, to establish that a violation took place and I so find.[14]

Roy Alsip. On August 23 Roy Alsip picked up a load and returned it to the terminal for dispatch. He

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14. Respondent contends that the record reveals that there was no such thing as a permanent assignment of a truck. That is quite clear. However the record reveals that trucks were assigned for lengthy periods of time up to periods of several months to a single driver who rode with various codrivers. The record also suggests that changes in assignments were made by way of punishment of drivers or at the request of drivers since assignments of trucks generally followed seniority. The record reveals that Respondent was purchasing new trucks and involving them in its Longview terminal business. Some of the drivers preferred the older trucks which are more powerful and accordingly there would necessarily be a considerable turnover as between trucks and drivers. This in no way disproves the evidence that senior drivers were permanently assigned specific trucks.

was informed that the second driver to be dispatched with him was a driver named Nolen. Alsip refused to drive with Nolen, referring to him by a combination of vulgar words, and said that he would either take it by himself or Nolen could take it by himself but he would not ride with Nolen. The dispatcher gave the load to Nolen. According to Alsip's testimony at that time he told the dispatcher that Nolen was too dangerous.

Alsip testified that he went to the terminal each day thereafter until August 29 on which date Anderson called him to the office and asked him why he refused the dispatch. Alsip said he did not refuse a dispatch but did refuse to run with Nolen to which Anderson replied that he was taking it as a refusal to dispatch. On this occasion Anderson told Alsip that he had 2 weeks to rest. On September 8 Alsip got a phone call from Terminal Manager Anderson and later got a letter from Safety Director Knight stating that he was suspended while the Employer investigated the incident. On September 23 Alsip got another letter from Knight stating that he was terminated.

The Respondent's version of the above events is somewhat different. Anderson in his first testimony when he was called by the General Counsel testified that Alsip was discharged for refusing a dispatch which he explained as follows: "He was scheduled to go out on a run with a co-driver. He wouldn't run with him." He later testified that Alsip was suspended on September 6 for failure to be available for dispatch but not with regard to the August 23 dispatch incident.

On direct examination, when Anderson was called to the stand by Respondent, he testified that when he ascertained that Alsip had declined to ride with Nolen he told him to take a couple of days off while Anderson contacted the Enid office to find out what to do. Thereafter, com-

mencing on the 28th, he attempted to locate Alsip for dispatch but was unable to do so until September 8 on which occasion he told Alsip that he was suspended and would receive a letter from the Enid office to that effect. He then testified that on September 8 he got his copy of the letter from Enid discharging Alsip and that he had suspended him on September 6. However, later Anderson was straightened out and recalled that he talked to Alsip about his suspension on September 8 but he was discharged on September 24. Asked why Alsip was not terminated on September 8 instead of 2 weeks later he answered that he did not know, but that Alsip's case "was under study at this time."

The letter of suspension to Alsip, dated September 6 and signed by A. B. Knight, the director of safety, stated that he was suspended as of September 6 pending "our investigation of your failure to report for dispatch between August 23 and September 5." Knight testified that his investigation of the situation consisted of a telephone call to Anderson in which Anderson reported that Alsip was not available for dispatch. Of course this is what Anderson had told him prior to September 6 but Knight testified that he expected that Alsip would be available for dispatch after the receipt of the letter of September 6 or that Alsip would contact Anderson or Knight to find out what was happening. When Alsip had contacted neither Anderson nor Knight by September 23, Knight determined to discharge him. Anderson was not able to explain what would impel Alsip to contact him inasmuch as the tenor of the letter of September 6 was that he was suspended until the Employer had completed its "investigation." Further it does not appear that any investigation took place. Anderson did not contact Alsip to inform him that the "investigation" consisted of waiting for Alsip to make himself available for talk with

either Anderson or Knight nor did Knight instruct Anderson to do so. According to Alsip's testimony he reported to the Longview terminal daily between August 23 and September 8 when he was informed that he had been suspended. Thereafter he came to the terminal two or three times prior to his discharge. On none of these occasions did he speak to Anderson nor did Anderson speak to him. Alsip testified that he attempted to talk to Craig, the dispatcher, but that Craig would not speak to him. The letter of termination dated September 23 and signed by Knight states, "your refusal to be dispatched on a load from the Longview terminal on August 23, 1972; and your failure to report for dispatch since August 24, 1972, prompted your termination."

Discussion and Conclusions

I find that Alsip was discharged because of his union adherence and activity. I find that at all times since the first week of April Respondent was aware of the fact that Alsip was the leading union adherent among its employees and, as spelled out above, Anderson had more than once revealed his disposition to get rid of Alsip for this reason.

Alsip testified that he had refused in the past to ride with other drivers and had never been admonished or punished for so doing. Silvertooth testified that he refused to ride with J. D. Spears on a trip in December of 1971 and with a driver named Beason after Groendyke took over in 1972. He testified that he was never reprimanded nor disciplined because of this. Alsip testified that when he first spoke to Anderson after his refusal to drive with Nolen, Anderson told him to take a couple of weeks off. Anderson testified that he told Alsip to take a couple of days off while he ascertained what Groendyke's Enid

office wanted him to do. Anderson testified that no one had ever before declined to make a trip because of the codriver assigned. I do not credit this assertion in view of the testimony of the drivers that they had in the past declined to ride with various employees without reprimand or punishment.

Dispatcher Craig testified that he attempted to get in touch with Alsip to dispatch him and identified memoranda allegedly written by Anderson to the Enid office that stated that Craig had attempted to make various telephone calls between August 28 and September 6. Although Craig in his testimony pretended to recall the incidents, it was obvious that he recalled nothing that was not written on the memoranda that he identified. He testified that he was sure that he had called Alsip before he started making memos and that normally he would try at least for a day to reach a driver before memorializing his difficulty in that regard, but he had no recollection of for how long he had tried to call Alsip or how many times. Similarly he had no recollection of the period between September 1 and September 5 during which no memoranda appeared to have been written, but he knew he had dispatched drivers during that period of time. Craig further testified that he had no knowledge of any suspension of Alsip other than that memorialized in the letter from Enid dated September 6. It is incredible to me that the terminal manager might have suspended a driver for 2 days or 2 weeks, depending on which version I accept, without informing the dispatcher of this fact.

Although both Craig and Anderson contended that memoranda of telephone calls were normally made when the dispatcher encountered difficulty in reaching an employee, no memoranda other than those in this incident were adduced by Respondent. Neither Craig nor Anderson

could detail the circumstances under which memoranda would be prepared. I conclude that the memoranda in this case were produced for the purposes of supporting the discharge of Alsip and were not generated in the normal course of business. I conclude further that the entire suspension and discharge of Alsip was unrelated to the refusal of Alsip to make the trip with Nolen as a codriver and also unrelated to his failure to be available for dispatch. I credit his testimony that he was indeed available for dispatch except for a period of a week after he was informed of his suspension by Safety Director Knight. I do not believe Knight's testimony that the suspension was converted to a discharge because of Alsip's "unavailability" between September 6 and September 23 because of the absence of any factor that would give Alsip any reason to believe that he was supposed to contact Knight. I credit Alsip's testimony that he was present at the Longview terminal at various times during the period from September 8 through September 23. I find in the absence of any reasonable explanation for Alsip's discharge and in contemplation of the threats by Anderson that Respondent would get rid of him that Alsip was discharged because of his union activity.

VI. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section V, above, occurring in connection with the respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Groendyke Transport, Inc. and Ann Myers Bell d/b/a Bell Transport Company, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily demoting R. B. Silvertooth from the position of first driver to that of second driver and by discharging Roy Alsip because of his activities on behalf of the Union, Respondent has discriminated in regard to hire or tenure and conditions of employment of its employees thereby discouraging membership in the Union in violation of Section 8(a)(3) of the Act.

4. By the above actions and conduct and by coercively interrogating employees, by threatening them with less advantageous working conditions and with discharge because of their activities on behalf of the Union and by promising benefits if the employees rejected the Union Respondent has interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act.

5. Respondent has not violated the Act in certain respects as set forth above.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Union's Objections (concluded)

I have found above that Respondent violated Section 8(a)(3) and (1) of the Act by the demotion of Silvertooth. I found additionally that during the period between the

filing of the petition and the election Anderson told Alsip that if he had not gotten involved in the Union he could expect to be assigned a new truck, told Maass that if the Union were voted in new trucks would not be brought to the Longview terminal, questioned Silvertooth concerning his opinion of the Union before the hearing on the representation petition, told Statler that if the Union came in there would be no more cash advances and that there would be quite a few people run off because of the Union and asked Statler who he was voting for, made statements to Statler from which the inference is clear that Silvertooth was demoted because of his union adherence, that he and Alsip and Maass would be terminated therefor and that Storch already had been. These incidents, all of which took place during the critical period, in my opinion require that the election be set aside. They all constitute objectionable conduct on the part of Respondent and its agent Anderson. Accordingly I recommend that the Union's objection be sustained and the election set aside.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since I find that Respondent discriminatorily discharged Roy Alsip and demoted R. B. Silvertooth I shall recommend that Respondent offer them immediate and full reinstatement to their former positions or, if those positions are no longer in existence, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination. Back-

pay shall be computed in accordance with the formula prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, together with 6 percent interest per annum to be computed in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716.

The General Counsel suggests that the unfair labor practices found to be committed in this matter are of such a nature that they render the holding of a valid election impossible within the meaning of the decision of the United States Supreme Court in the *Gissel* case (*supra*).

Respondent submits in its brief that a *Gissel* order requires proof that Respondent has been guilty of serious, "massive," unfair labor practices which *preceded* this election and affected the results thereof. The Respondent points out:

> The only employee fired prior to the election was Storch. If this charge is dismissed then that would leave the tenuous charges of Alsip and Silvertooth to support the alleged massive misconduct.
>
> The prayer for a bargaining order appears to be an afterthought and unsupported by the record. If the conduct recited by Alsip and Silvertooth did in fact affect the results of the election, then the Board can order a new election as a remedy for the employer's alleged misdeeds.

While it is true that the former election may not be set aside except on a finding of objectionable conduct preceding the election, a consideration of whether the activities of the Respondent are of such a nature that the imposition of a bargaining order is necessary because of the improbability that a fair election could be conducted requires the consideration of the state of affairs that would

exist were the election to be rerun. I have found that conduct of Respondent sufficient to require the setting aside of the original election has been proved by the General Counsel, but this conduct is not all that would be before the employees if they were to vote again. Indeed the post-election unfair labor practices which I have found, that is to say the discharge of Alsip and additional 8(a)(1) violations consisting of a statement to Statler by Anderson after the election that revealed Anderson's opinion that he had the union advocates where he wanted them and they would not be driving longer are also facets to be considered. By and large it is my opinion that the extensive violations of Section 8(a)(1) and (3) by Respondent would reasonably be expected to have the effect of undermining the Union's majority, that they destroyed the conditions necessary to the holding of a free and fair election and are not such that it may reasonably be expected that normal Board remedies would restore the necessary laboratory conditions. I conclude that in order to protect the statutory rights and interests of employees and to remedy these violations of Section 8(a)(1) and (3), it is essential that Respondent be ordered to recognize and bargain with the Union as the statutory representative of its employees for the purposes of collective bargaining.[15] Accordingly I shall recommend that Respondent be ordered to bargain on request with the Union as the representative of its employees in the unit consisting of all drivers, service mechanics and the dispatcher of the Employer at its terminals in Longview, Tyler and Mount Pleasant, Texas, excluding office clerical employees, guards, terminal man-

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15. The General Counsel adduced authorization cards of at least 45 employees. The May 26 payroll listed 64 employees. The Union obviously represented a majority of the employees at the time of the hearing in the representation case.

ager and all supervisors as defined in the Act, which was found to be an appropriate unit in Case 16—RC—5991.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[16]

ORDER

Respondent, Groendyke Transport, Inc. and Ann Myers Bell d/b/a Bell Transport Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their and other employees union activities, threatening employees that if they select the Union as their representative they will not be given new trucks to drive or will be denied other benefits, threatening employees that they or other employees will be discharged because of their union activities or promising benefits to employees if they reject the Union as their collective-bargaining representative.

(b) Discriminating against employees because of their union activities and adherence by changing their assignment to less desirable or remunerative assignments or by discharging them because of their activities on behalf of the Union.

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16. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request recognize and bargain collectively with Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the appropriate unit set forth in the Regional Director's Decision and Direction of Election in Case 16—RC—5991.

(b) Offer to R. B. Silvertooth and Roy Alsip immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights, privileges or working conditions and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the section hereto entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Upon request bargain collectively with the above-named Union as the collective-bargaining representative of its employees in the appropriate unit set forth above and embody in a signed agreement any understanding reached.

(e) Post at its terminal at Longview, Texas, copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by the Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ Paul E. Weil
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and

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17. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

has ordered us to post this notice and we intend to carry out the Order of the Board and abide by the following.

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through representatives of their choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with or restrains or coerces employees with respect to these rights.

WE WILL NOT discriminate against our employees for engaging in activities on behalf of the Union or on their own behalf.

WE WILL NOT threaten to lay off or discharge employees for engaging in union activities.

WE WILL NOT coercively interrogate our employees concerning their or other employees union activities.

WE WILL NOT promise our employees benefits if they reject the Union as their collective-bargaining representative.

WE WILL upon request recognize and bargain with Southern Conference of Teamsters, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the representative of our employees in the unit which the Board

found to be appropriate for purposes of collective bargaining and WE WILL embody in a signed agreement any understanding reached.

WE WILL reinstate R. B. Silvertooth and Roy Alsip to their former jobs or, if those jobs no longer exist, to other equivalent jobs and we will make them whole for any pay they lost as a result of our discrimination against them.

Groendyke Transport, Inc. and
Ann Meyers Bell d/b/a Bell
Transport Company
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817—334—2921.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GROENDYKE TRANSPORT, INC. and Ann Myers
Bell d/b/a Bell Transport Company,
Respondents.

No. 73-3327

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 26, 1974.

Proceeding for enforcement of NLRB orders setting aside representation election lost by union and directing employer to bargain upon request. The Court of Appeals held that evidence sustained determinations that employer had committed unfair labor practices in connection with representation election, and that orders were within authority of NLRB to make.

Enforcement granted.

1. Labor Relations (Key) 557, 558, 570, 576

Evidence supported NLRB determination that company, prior to representation election, had unlawfully made threats to discharge union adherents, interrogated employees as to union support, offered improved working conditions, made threats of more unpleasant working conditions

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*Rule 18, 5th Cir.; *See* Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

and withholding of benefits, and discriminatorily demoted union adherent. National Labor Relations Act, § 8(a)(1, 3) as amended 29 U.S.C.A. § 158(a)(1, 3).

2. Labor Relations (Key) 721

Determination of credibility of witnesses is for administrative trier of fact and not for reviewing court in proceeding to enforce NLRB order. National Labor Relations Act, § 8(a)(1, 3) as amended 29 U.S.C.A. § 158(a)(1, 3).

3. Labor Relations (Key) 367, 368, 372, 382, 393

Employer committed unfair labor practices by making threats to discharge union adherents, interrogating employees as to union support, offering improved working conditions, making threats of more unpleasant working conditions and withholding of benefits, and discriminatorily demoting union adherent before representation election, and by discriminatorily discharging another after election. National Labor Relations Act, § 8(a)(1, 3) as amended 29 U.S.C.A. § 158(a)(1, 3).

4. Labor Relations (Key) 215

NLRB acted within its discretion in setting aside representation election, lost by union, on basis of unfair labor practices of employer.

5. Labor Relations (Key) 616

Where employer, prior to representation election, made threats to discharge union adherents, interrogated employees as to union support, offered improved working conditions, made threats of more unpleasant working conditions and withholding of benefits, and discriminatorily demoted union adherent, and where employer after election discriminatorily discharged another union adherent, NLRB was

authorized to issue bargaining order. National Labor Relations Act, § 8(a)(1, 3) as amended 29 U.S.C.A. § 158(a)(1, 3).

Application for Enforcement of the orders of the National Labor Relations Board (Texas Case).

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

In this enforcement proceeding, the respondent companies challenge the National Labor Relations Board's findings of unfair labor practices, its order setting aside the election, and its order to bargain with the intervening union upon request. 204 N.L.R.B. No. 27 (1973). We grant enforcement in full.

The Board, which adopted the opinion of the Administrative Law Judge, found the following section 8(a)(1) and (3) violations: threats to discharge union adherents, illegal interrogation of employees as to union support, offers of improved working conditions, threats of more unpleasant working conditions and withholding of benefits, and the discriminatory discharge of one leading union adherent and the demotion of another. The Board found that the union once held a clear majority of authorization cards, but that its strength had been dissipated by respondents' conduct, so that the election resulted in a tie vote. Finally, the Board found that its traditional remedies would probably not restore the laboratory conditions necessary for a free and fair election and that a bargaining order was required to protect the employees' statutory rights.

[1, 2] We are convinced that the Board's findings of 8(a)(1) and (3) violations are supported by "substantial

evidence on the record considered as a whole." Universal Camera Corp. v. NLRB, 340 U.S. 474, 491, 71 S.Ct. 456, 466, 95 L.Ed. 456 (1951). The main thrust of the companies' attack challenges the Administrative Law Judge's explicit findings as to witness credibility. Credibility determinations, however, are for the administrative trier of facts and not for this Court. NLRB v. B. F. Diamond Construction Co., 410 F.2d 462 (5th Cir.), cert. denied, 396 U.S. 835, 90 S.Ct. 94, 24 L.Ed.2d 86 (1969); NLRB v. May Aluminum, Inc., 398 F.2d 47 (5th Cir. 1968).

[3, 4] The acts themselves are clearly unfair labor practices. *See, e. g.*, Chevron Oil Co. v. NLRB, 442 F.2d 1067 (5th Cir. 1971); NLRB v. Texas Industries, Inc., 426 F.2d 812 (5th Cir. 1970); NLRB v. Varo, Inc., 425 F.2d 293 (5th Cir. 1970). Respondents, however, contend that the Board was not warranted in setting aside the election, pointing out that the discriminatory discharge occurred after the election. The rest of the unfair labor practices, with the exception of one threat, occurred before the election and the Board was within its discretion in setting aside the election on the basis of that conduct.

[5] Finally, the companies' challenge to the propriety of the bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), must also fail. The unfair labor practices that occurred both before and after fall within the scope of the second category of cases for which *Gissel* authorized the issuance of bargaining orders. *See, e. g.*, NLRB v. Orlando Paper Co., 480 F.2d 1200 (5th Cir. 1973); NLRB v. Kaiser Agricultural Chemicals, 473 F.2d 374 (5th Cir. 1973); NLRB v. WKRG-TV, Inc., 470 F.2d 1302 (5th Cir. 1973).

Enforced.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3327

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GROENDYKE TRANSPORT, INC., AND ANN MEYERS BELL d/b/a BELL TRANSPORT COMPANY,
Respondent.

JUDGMENT

Before: Coleman, Dyer and Roney, Circuit Judges.

THIS CAUSE was submitted upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Groendyke Transport, Inc., and Ann Myers Bell d/b/a Bell Transport Company, its officers, agents, successors and assigns on June 12, 1973. This Court having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on April 26, 1974, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Groendyke Transport, Inc., and Ann Myers Bell d/b/a Bell Transport Company, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

ENTERED:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-3327

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

GROENDYKE TRANSPORT, INC. AND
ANN MYERS BELL d/b/a BELL
TRANSPORT COMPANY,
Respondents.

On Application for Enforcement of an Order of
The National Labor Relations Board
(Texas Case)

ON PETITION FOR REHEARING

(Filed June 19, 1974)

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX E

NATIONAL LABOR RELATIONS ACT, Sec. 8(a)(1, 3), as amended.

TITLE 29, U.S.C.A. §158(a)(1, 3)

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in §157 of this title;

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(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .